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No. 04-897

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

When PBGC invokes its statutory right to seek termination of a pension plan in order to avoid an unreasonable increase in financial loss to the federal guaranty fund, and notice of the proposed termination is provided to plan participants, is it proper for the court to issue a decree that terminates the plan, and protects the PBGC guaranty fund, by fixing a termination date that is on or after the date that participants receive notice of the termination?

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PENSION BENEFIT GUARANTY CORPORATION,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

Respondent Pension Benefit Guaranty Corporation ("PBGC") opposes the grant of a writ of certiorari in this case. Review is not warranted because there is no conflict among the five courts of appeals that have set out the test for establishing a date of plan termination under 29 U.S.C. § 1348(a)(4), there is no conflict between the decisions of those courts of appeals and any decision of this Court, and there is no important question of federal law that should be settled by this Court. Supreme Court Rule 10(a), (c).

STATEMENT OF THE CASE

A. Statement of Facts

PBGC is the federal agency established by the Employment Retirement Income Security Act of 1974 ("ERISA") *as*

amended, 29 U.S.C. §§ 1301-1461 (2000 and Supp. I 2001), to administer the nation's pension plan termination insurance program. *See generally PBGC v. LTV Corp.*, 496 U.S. 633, 636-39 (1990). PBGC receives no money from the United States Treasury, and the United States "is not liable for any obligation or liability incurred by [PBGC]." 29 U.S.C. § 1302(g)(2). PBGC has only three sources from which it can fund guaranteed benefits: premiums paid by employers who sponsor defined benefit plans, assets and asset earnings of terminated plans, and statutory liability paid by employers that sponsored terminated plans. 29 U.S.C. §§ 1305-1307, 1362.[1]

In recent years, PBGC's single-employer pension plan termination insurance program has operated at a substantial deficit. For fiscal year 2004, PBGC estimated its deficit at $23.3 billion. PBGC 2004 Performance and Accountability Report (Nov. 15, 2004) at 13 (available at www.pbgc.gov/publications/annrpt/PAR1104.pdf). This deficit has grown from $3.6 billion and $11.2 billion for fiscal years 2002 and 2003, respectively, and contrasts with the $7.7 billion surplus that existed in fiscal year 2001. PBGC Pension Insurance Data Book, Table S-1 at 25 (available at www.pbgc.gov/publications/databook/databook03.pdf).

To protect the termination insurance program, ERISA allows PBGC to apply to a district court for an order terminating a pension plan if PBGC determines that its "possible long-run loss . . . with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a)(4). The district court has authority under 29 U.S.C. § 1342(c) to terminate the plan, *inter alia*, to avoid "any unreasonable increase in the liability" of

[1] PBGC has independent litigating authority based on its power "to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal." 29 U.S.C. § 1302(b)(1). *See also LTV*, 496 U.S. at 635-36.

PBGC's insurance fund. In the event that PBGC and the employer are unable to agree on a date of plan termination, the date is established by the court. 29 U.S.C. § 1348(a)(4).

In this case, PBGC sought to terminate four pension plans administered by a bankrupt steel manufacturer, Republic Technologies International, LLC ("RTI"). The two plans at issue here (the "Union Plans") cover participants represented by petitioner United Steelworkers of America ("USWA"). Pet. App. at 6a.

The Union Plans included "shutdown benefits." *Id.* Shutdown benefits are enhanced early retirement benefits that are contingent on the permanent closing of an employer's facility. Shutdown benefits provide eligible participants with their full, actuarially unreduced benefits that they otherwise would receive only at 65 years of age. Eligible participants can begin receiving shutdown benefits as early as age 45. *See id.* at 7a. An employer can promise shutdown benefits at any time. However, an employer is not required to fund shutdown benefits, or pay any premiums to PBGC for them, until a permanent shutdown occurs. *Id.* at 6a. When shutdown benefits become nonforfeitable immediately before the date of plan termination, the employer is *never* required to fund them and is *never* required to pay premiums to PBGC for those benefits. Thus, "the cost of shutdown benefits can be very high." *Id.* at 7a.

In April 2001, RTI filed a petition for bankruptcy protection. *Id.* at 8a. After that filing, RTI continued its operations, retained its USWA-represented workers, and honored the terms of the existing bargaining agreements. The company did, however, stop paying its statutorily-mandated contributions to its four pension plans. In December 2001, RTI and USWA signed a modified labor agreement which specified that if RTI did not file a plan of reorganization by May 31, 2002, the company would be compelled to sell its assets to a purchaser who would commit itself to signing on to the terms

of the USWA labor agreement. *Id.* at 26a-27a. The company eventually located an asset purchaser, Newco, that was willing to sign the modified USWA labor agreement. *Id.* at 8a. But Newco refused to assume responsibility for any of RTI's pension plans. *Id.*

Because RTI could not fund the pension plans, and Newco would not fund them, it became apparent that the plans would eventually terminate. However, USWA wished to obtain shutdown benefits for its members, even though RTI's plants would not actually cease operations and many RTI employees would simply go to work for Newco. To that end, USWA negotiated a letter agreement in which RTI promised that all of RTI's facilities covered by the USWA agreement would be "declared" to have incurred a permanent shutdown, regardless of whether the plants remained in operation. *Id.* Through this device, it was anticipated that workers employed by Newco could be deemed entitled to early retirement benefits from the Union Plans, which would then be paid by PBGC after plan termination. The Newco sale, in turn, was conditioned on bankruptcy court approval of the letter agreement. *Id.* On May 31, 2002, the bankruptcy court scheduled a hearing to approve the asset sale and the letter agreement for July 9, 2002. *Id.*

PBGC concluded that if it were required to pay shutdown benefits in the Union Plans, its long-run loss could reasonably be expected to increase unreasonably. 29 U.S.C. §§ 1342(a)(4), (c). Shutdown benefits in the Union Plans would add $95 million in unfunded benefits that PBGC could be required to guarantee. This would be in addition to the more than $100 million in existing unfunded benefits PBGC was already required to pay. On June 14, 2002, PBGC initiated proceedings in the United States District Court for the Northern District of Ohio to terminate the Union Plans under 29 U.S.C. §§ 1342(a)(2), (4) and (c) to prevent any unreasonable increase in the liability of the PBGC insurance

fund. Pet. App. at 9a-10a. On the same day, PBGC gave notice of its intention to seek termination of the Union Plans to the Plan Administrator and to USWA, and also published its notice in national and local newspapers where RTI's facilities were located. *Id.* The notice stated that the Union Plans would terminate as of June 14, 2002. *Id.* at 52a. On July 11, 2002, the bankruptcy court approved the sale of RTI's assets and the letter agreement, without prejudice to PBGC's rights in the termination action. *Id.* at 14a-15a.

B. District Court Decision

The district court upheld PBGC's decision to terminate all four of RTI's pension plans. Pet. App. at 32a. It reviewed PBGC's extensive administrative record and found that PBGC's decision to terminate the Union Plans was not arbitrary or capricious. *Id.* at 35a. The district court concluded that it would "defer to the PBGC's determinations that the [Union Plans] must be terminated to prevent any unreasonable increase in the liability of the PBGC insurance fund." *Id.*

The district court accepted PBGC's proposed date of plan termination, June 14, 2002, for the two non-union plans, neither of which contained shutdown benefits. *Id.* at 45a. However, with respect to the Union Plans, the district court found that the same notice that extinguished participants' reliance interest in other pension benefits did not extinguish participants' interest in shutdown benefits. *Id.* at 41a-42a. Citing PBGC's $7.7 billion surplus as of the end of fiscal year 2001, the court refused to defer to PBGC's determination of its financial interest in setting the termination date. *Id.* at 44a. Consequently, the district court selected August 17, 2002, one day after the "declared" shutdown, as the date of plan termination of the Union Plans. *Id.* at 45a.

C. Court of Appeals Decision

The court of appeals reversed. Following the decisions of four other circuits, the court held that the "most appropriate factors for us to focus on" in selecting a termination date are the expectations of participants and the financial implications of the termination for PBGC. Pet. App. at 11a-12a. The court rejected the district court's conclusion that participants' reliance interest in shutdown benefits remains "strong" even after "they receive notice from PBGC that the plan is about to be terminated at a date prior to the vesting of those benefits." *Id.* at 13a. Instead, the court concluded that the requirement of notice is sufficient to extinguish participants' interests in shutdown benefits to the same extent as any other type of pension benefit. The court of appeals also noted that bankruptcy court approval for the shutdown agreement was not given until "almost one month *after* PBGC issued the notices of termination," *id.* at 14a (emphasis in original), preventing participants from developing any heightened reliance interest in benefits that were contingent upon that approval.

The court of appeals held that the district court "failed to give appropriate deference to PBGC's conclusion that it faced an unreasonable increase in its liabilities if the court selected a termination date after 'shutdown.'" *Id.* at 15a. The court rejected the district court's assertion that PBGC failed to consider the impact of the shutdown benefits on the insurance fund as a whole, reasoning that PBGC is expressly authorized to terminate a plan when "the possible long-run loss of [PBGC] *with respect to the plan* may reasonably be expected to increase unreasonably if the plan is not terminated." *Id.* (citing 29 U.S.C. § 1342(a)(4)) (emphasis in original). Consequently, the court concluded that June 14, 2002, the date on which participants' reliance interests were extinguished by notice, and the date PBGC had proposed, was the appropriate date of termination for the Union Plans. *Id.* at 16a.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ABOUT THE TEST FOR ESTABLISHING A DATE OF TERMINATION.

The decision of the court of appeals is entirely consistent with the decisions of the four other courts of appeals that have interpreted 29 U.S.C. § 1348(a)(4) over the past quarter century. Every court of appeals that has considered the question has held that a date of plan termination is determined by applying a two-step test. First, the court looks to the earliest date on which plan participants receive actual or constructive notice that the pension plan will be terminated. Once participants receive notice of plan termination they can no longer justifiably rely on the vesting or accrual of any additional benefits. Second, the court selects the date on or after such notice that will best protect PBGC's financial interests. Pet. App. at 11a-12a, 16a; *Pension Comm. for Farmstead Foods Pension Plan for Albert Lea Hourly Employees v. PBGC*, 991 F.2d 1415, 1419 (8th Cir.1993); *PBGC v. Mize Co.*, 987 F.2d 1059, 1062-63 (4th Cir. 1993); *PBGC v. Broadway Maint. Corp. (In re Pension Plan for Employees of Broadway Maint. Corp.)*, 707 F.2d 647, 652-53 (2d Cir. 1983); *United Steelworkers of Am. v. Harris & Sons Steel Corp.*, 706 F.2d 1289, 1296 (3d Cir. 1983); *PBGC v. DiCenso (In re Syntex Fabrics, Inc. Pension Plan)*, 698 F.2d 199, 201 (3d Cir. 1980); *PBGC v. Heppenstall Co.*, 633 F.2d 293, 300-02 (3d Cir. 1980). Recognizing that PBGC is the best judge of its financial interests, every circuit that has considered the question has deferred in this second step to PBGC's analysis of what termination date best serves the financial well-being of the insurance fund. Pet. App. at 15a; *Farmstead*, 991 F.2d at 1419; *Mize*, 987 F.2d at 1062-63; *Broadway Maint.*, 707 F.2d at 652; *Harris & Sons*, 706 F.2d at 1296.

The court of appeals' decision in this case is consistent with this long-standing and uniform precedent. Indeed, the

decision expressly states that it follows the two leading decisions in *Broadway Maintenance* and *Heppenstall* on the proper test to be used in establishing a date of plan termination. Pet. App. at 11a-12a, 16a. Thus, there is no conflict in the circuits.

II. THE COURT OF APPEALS' DECISION IS LEGALLY SOUND.

A. The Test Used by the Courts of Appeals Gives Full Effect to the Relevant Factors Identified in ERISA.

The two-step test the courts of appeals have embraced gives effect to the statutory criteria identified by Congress to involuntarily terminate a pension plan. ERISA "provides for involuntary termination proceedings 'to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund.'" Pet. App. at 11a-12a (quoting 29 U.S.C. § 1342(c)); *see also* 29 U.S.C. § 1342(a)(4) (authorizing PBGC to seek involuntary termination of a pension plan where "the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.").

Under the two-step test, participants' interests in the continued vesting and accrual of benefits are fully protected, and given primary weight, until the date on which they have notice that the plan will be terminated. However, as the court of appeals found, "Every court to consider the issue has held that expectation interests in the accrual of benefits are extinguished on the date that participants receive reasonable notice from PBGC that the plan is going to be terminated." Pet. App. at 14a.

USWA argues that notice does not extinguish participants' expectation interests in shutdown benefits because shutdown benefits have allegedly unique characteristics that distinguish

them from other types of benefits. Pet. at 10-13. This is an artificial distinction. No court selecting a termination date has ever found a basis for distinguishing between forms of benefits, or held that some types of benefits inherently come with stronger reliance interests than others.

ERISA makes no distinction between various forms of benefits for the purposes of plan termination. PBGC guarantees only those benefits that are "nonforfeitable" as of the date of plan termination.[2] 29 U.S.C. § 1322(a). In this case, USWA concedes that the shutdown benefits in the Union Plans were forfeitable on June 14, 2002, PBGC's proposed date of plan termination and the date PBGC gave notice of termination to participants. Pet. at 11, 17. USWA further concedes that the PBGC guarantee would extend to shutdown benefits only "[i]f a shutdown occurs before the date of plan termination." *Id.* at 11; *see also id.* at 17. Here, there was no real or declared shutdown on or before June 14, 2002.

The second factor the court of appeals considered—PBGC's financial interests—reflects the statutory language authorizing PBGC to terminate a plan to avoid an unreasonable increase in the liability of the insurance fund. 29 U.S.C. §1342(c). As the court of appeals recognized, "ERISA provides for involuntary termination proceedings precisely so that PBGC can protect its own financial interests . . . ." Pet. App. at 16a; *see also Farmstead*, 991 F.2d at 1420-21; *Mize*, 987 F.2d at 1062-63; *Broadway Maintenance*, 707 F.2d at 652-53; *Harris & Sons*, 706 F.2d at 1296. In this case, PBGC's financial interests were clear. PBGC sought to protect the insurance fund from an increase of about $95 million in guaranteed benefits—in addition to the $100 million in guaranteed benefits PBGC was already obligated to pay the

[2] A "nonforfeitable benefit" is a benefit for which the participant has satisfied the conditions for entitlement under ERISA and the terms of the plan, other than submission of a formal application, retirement, or completion of a required waiting period. 29 U.S.C. § 1301(a)(8).

Union Plan participants—if shutdown benefits became non-forfeitable. Pet. App. at 1a, 15a.

The court of appeals was well aware that selection of a termination date that would cause the very loss PBGC sought to prevent could eviscerate the involuntary plan termination provisions of ERISA. *Id.* at 15a-16a. By selecting a termination date that occurs once participants have notice, but before PBGC is obligated to guarantee an additional $95 million in unfunded shutdown benefits, the court of appeals respected the balance between the statutory interests at stake: "[I]n reversing the district court's selection of a termination date, we not only adhere to the statutory scheme of ERISA and follow *Broadway Maintenance* and *Heppenstall*, but also safeguard this insurance system for the benefit of future employees while at the same time honoring the expectations of the plans' participants as much as possible." *Id.* at 16a.

B. There Is No Unambiguous Provision of ERISA That Compels PBGC to Guarantee Shutdown Benefits.

USWA commences its argument by quoting the maxim that if a statute is clear and unambiguous, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). This truism is followed by the announcement that PBGC—and, by implication, every court that has ever reviewed a PBGC termination action—has interpreted 29 U.S.C. § 1348(a)(4) "in a manner that is inconsistent with the agency's obligation to guarantee shutdown benefits." Pet. at 11.

Nothing could be further from the truth. Courts have uniformly concluded that 29 U.S.C. § 1348(a)(4) "does not provide specific guidance on what factors the court should use when making its selection [of a termination date]." Pet.

App. at 11a; *accord Farmstead*, 991 F.2d at 1419; *Mize*, 987 F.2d at 1062, *Heppenstall*, 633 F.2d at 297 ("Nowhere in the statute . . . is there any specific standard for the court's guidance in selecting a date."). The statute is utterly silent as to *how* a court should set a termination date; it merely provides that in a case where the PBGC and plan administrator cannot agree on a date, "the termination date of a single-employer plan is . . . the date established by the court." 29 U.S.C. § 1348(a)(4).

Nothing in section 1348(a)(4) supports USWA's policy argument that PBGC must subordinate the financial solvency of the insurance fund in order to maximize the financial interests of participants in a particular plan. To the contrary, PBGC has a duty to the 44 million participants in other insured plans to keep the insurance program viable. Pet. App. at 16a; *see also PBGC v. Pension Comm. of Pan Am. World Airways, Inc. (In re Pan Am. World Airways, Inc. Coop. Ret. Inc. Plan)*, 777 F. Supp. 1179, 1183 (S.D.N.Y. 1991), *aff'd mem.*, 970 F.2d 896 (2d Cir. 1992) ("the PBGC fund must be available to protect the minimally guaranteed benefits of the beneficiaries of all covered plans in the United States . . . .").

Indeed, since the term "shutdown benefits" is nowhere mentioned in ERISA, one can hardly say that PBGC or the court of appeals violated an unambiguous or unequivocal statutory command. USWA attempts to create such a command by looking to 29 U.S.C. § 1302(a), which recites the three broad general purposes of Title IV. 29 U.S.C. §§ 1302(a)(1)-(3). However, this provision does not speak at all to the factors a court should consider in establishing a plan termination date. Even if it did, this provision is silent as to how these statutory purposes should be balanced.

USWA's reading of the statute would not balance these purposes, but would subordinate the third purpose, "to maintain premiums . . . at the lowest level consistent with carrying out [PBGC's statutory] obligations . . . ," 29 U.S.C.

§ 1302(a)(3), to the boundless expectations of plan participants in additional benefit accruals. Nothing in ERISA, however, suggests such a reading is required by the statute or is preferable to the court of appeals' test, which accommodates both plan participants' reasonable interests and the long-term fiscal health of the PBGC. As this Court observed, "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *LTV*, 496 U.S. at 647, *quoting Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original).

USWA further asserts that because Congress denied PBGC's request in 1994 to limit the agency's liability for shutdown benefits, Congress intended PBGC to guarantee those benefits and to refrain from involuntarily terminating a pension plan until after the shutdown occurs. Pet. at 12. USWA reads far too much into this congressional inaction. Congress may well have concluded that the existing statutory framework already provided PBGC with adequate means to avoid liability for shutdown benefits. Indeed, in a case involving another provision of Title IV, this Court reasoned: "Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *LTV*, 496 U.S. at 649-50 (internal citations omitted). *See also, e.g., United States v. Craft*, 535 U.S. 274, 287 (2002); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). The situation that existed in *LTV* is present here as well, and the Court should draw no inferences from Congress's failure to enact legislation more than 10 years ago.

C. The Court of Appeals Did Not Abdicate Its Responsibility to Establish the Date of Plan Termination.

USWA contends that by deferring to PBGC's identification of its financial interests, the court of appeals unlawfully abdicated its judicial role in violation of the separation of powers doctrine. Pet. at 14-16. USWA's argument is factually and legally inaccurate.

Contrary to USWA's claim, the court of appeals expressly acknowledged its statutory responsibility to set a termination date: "[D]espite the importance of termination dates, ERISA does not give PBGC unilateral authority to set them, even in involuntary proceedings. If the plan administrator does not agree with the date proposed by PBGC in an involuntary proceeding, a federal district court sets the date of plan termination." Pet. App. at 6a. Nor does the test established in *Heppenstall* and *Broadway Maintenance* and adopted by the court of appeals here delegate the court's judicial responsibility to PBGC. A court performs many functions in determining an appropriate date of plan termination. First, under the Administrative Procedure Act, 5 U.S.C. § 706(2), the court scrutinizes PBGC's grounds for terminating the plan under 29 U.S.C. §§ 1342(a) and (c). Second, the court must ensure that participants have received notice of plan termination.[3] Third, the court must identify the date on which such notice was provided. Finally, a court must review, with appropriate deference, PBGC's explanation of why it has chosen a particular termination date on or after the date participants receive notice.

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[3] Notice does not exclusively come from PBGC. It could come from facts giving rise to constructive notice, such as the cessation of the employer's operations and dismissal of all of its employees. Of course, notice cannot retroactively extinguish benefits that are already vested and accrued. *Heppenstall*, 633 F.2d at 302; *PBGC v. Maryland Glass Corp.*, 618 F. Supp. 1410, 1415 (D. Md. 1985), *aff'd mem.*, 814 F.2d 655 (4th Cir. 1987).

It is entirely appropriate that a court defer to PBGC's evaluation of the insurance fund's financial interest as PBGC is best situated to make that determination. Pet. App. at 15a-16a. The courts of appeals have thus uniformly held that "PBGC's interests should be deemed to be best served by the date proposed by PBGC" and that "PBGC's interests should be deferred to, at least to the extent of determining its own best interests." Pet. App. at 15a, *citing Mize*, 987 F.2d at 1063; *see also Farmstead*, 991 F.2d at 1419; *Broadway Maint.*, 707 F.2d at 653; *Harris & Sons*, 706 F.2d at 1296.[4]

In these circumstances, there is no separation of powers concern. *See* Pet. at 14-16. This Court has consistently rejected arguments that judicial deference to administrative expertise is inconsistent with the separation of powers. *See generally Chevron*, 467 U.S. at 866. As this Court recently stated, "Deference is not abdication." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment). Indeed, this Court has regularly given deference to PBGC's interpretations of Title IV of ERISA.[5]

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[4] USWA incorrectly cites *Pan Am* for the proposition that PBGC is not entitled to deference when it selects a date of plan termination to protect its interests. Pet. at 16. The *Pan Am* court established as the date of plan termination the date on which it found that participants reasonably should have known about PBGC's newspaper publication of its notice of termination. *Pan Am.*, 777 F. Supp. at 1185. Here, unlike in *Pan Am*, the date of plan termination selected by the district court caused the very loss PBGC sought to prevent.

[5] *See LTV*, 496 U.S. at 651 ("[T]he judgments about the way the real world works that have gone into the PBGC's . . . policy are precisely the kind that agencies are better equipped to make than courts."); *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989) ("For a court to attempt to answer . . . questions [about ERISA] without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" (internal citation omitted)); *Nachman Corp. v. PBGC*, 446

D. The Court of Appeals' Interpretation of 29 U.S.C. § 1348(a)(4) Is Consistent With Other Provisions of Title IV of ERISA.

USWA argues that the court of appeals' application of the test established by *Broadway Maintenance* and *Heppenstall* renders 29 U.S.C. §§ 1322(a) and 1348(a) superfluous because PBGC can always seek a date of plan termination prior to the date that shutdown benefits become nonforfeitable, and courts must defer to PBGC's choice of termination date. Pet. at 16-18.[6] USWA's contention that PBGC has a universal obligation to guarantee shutdown benefits completely disregards ERISA's plan termination provisions that are designed to protect against unreasonable increases in the PBGC insurance fund's liabilities. *See* 29 U.S.C. §§ 1342(a)(4) and (c). Congress explicitly authorized PBGC to involuntarily terminate a pension plan whenever liability increases with respect to the plan were unreasonable. USWA's reading of the court's authority to set a termination date under 29 U.S.C. § 1348(a)(4) would render these important provisions superfluous. USWA's interpretation, which looks exclusively to maximize the interests of participants, would allow a court to determine that a plan must be terminated to prevent an unreasonable loss to the pension insurance system, but then set a date of plan termination that causes that very loss. The district court made this error, and the court of appeals quite properly corrected it.

U.S. 359, 373-74 (1980) (in reviewing PBGC's interpretation of nonforfeitable benefits under 29 U.S.C. § 1322(a), the Court stated, "We surely may not reject the contemporary construction of the statute by the PBGC without a careful examination of Title IV and its underiying legislative history to see what benefits Congress intended to insure.").

[6] USWA claims, "Unless PBGC is unaware that a shutdown is imminent, which is unlikely, PBGC always will publish a notice stating its intent to seek termination of the plan before the anticipated shutdown date." Pet. at 17. In fact, PBGC often does not learn about a shutdown until after it has occurred.

Likewise, the court of appeals' decision accords full meaning to 29 U.S.C. § 1322(a), which requires PBGC to guarantee "nonforfeitable" benefits. Pet. App. at 13a-16a. A benefit that has not accrued or vested as of the date of plan termination is by definition a "forfeitable" benefit. Under ERISA, forfeitable benefits are not guaranteed. 29 U.S.C. § 1322(a). As USWA concedes, when a plan termination date precedes the permanent shutdown of an employer's facility, shutdown benefits are not vested; rather, they are forfeitable, and therefore they are not guaranteed. Pet. at 11, 17. In this regard, shutdown benefits are no different from any other form of benefit where the participant has not met the conditions for entitlement that are a prerequisite to making the benefit nonforfeitable as of the date of plan termination.

III. USWA'S INTERPRETATION OF 29 U.S.C. § 1348(a)(4) WOULD HARM THE PENSION INSURANCE PROGRAM.

USWA's interpretation of 29 U.S.C. § 1348(a)(4), which would require PBGC to guarantee the payment of unfunded shutdown benefits, would seriously undermine the agency's mission as the insurer of last resort. There is no question that in this case alone a date of plan termination after the "declared" shutdown could nearly double PBGC's loss by adding almost $100 million to PBGC's liabilities. Pet. at 6, 9, 15. If PBGC were required to guarantee payment of shutdown benefits for the entire universe of pension plans that contain such benefits, the financial impact of USWA's position would be staggering. As the record in this case demonstrates, when PBGC took action to terminate the Union Plans, PBGC was faced with the prospect of incurring up to $2.7 billion in additional losses if it were forced to assume the cost of shutdown benefits in the financially troubled steel industry alone. Admin. Rec. 2643.

The test for establishing termination dates urged by the USWA could also provide an incentive for private parties to

deliberately shift unfunded pension promises onto PBGC, a result that would jeopardize the pension insurance program and exacerbate the moral hazard. Here, the moral hazard is the very real risk that an employer covered by the federal insurance fund will obtain labor peace by promising benefits that the employer cannot afford, expecting PBGC to cover the difference.

That is precisely what happened in this case. Management and labor agreed among themselves to add millions of dollars in unfunded shutdown benefits and knowingly left PBGC to pick up the tab. Pet. at 5-6; Pet. App. at 7a-8a. Thus, the test urged by USWA would allow private parties to contract in such a manner as to dictate government operations, to the detriment of PBGC and premium-payers. This is exactly the type of moral hazard this Court has found unacceptable. *Nachman*, 446 U.S. at 367 n.12 ("employers might use promises of higher retirement benefits for bargaining leverage, knowing that the PBGC would be required to fulfill the promise."); *see also LTV*, 496 U.S. at 642, 651-52.

The temptation for private parties to abuse the pension insurance system increases where, as here, the employer is not required to fund the promised benefits or pay PBGC insurance premiums to help cover the agency's increased risk of loss. If PBGC did not have the ability to seek a timely termination date to protect itself from this moral hazard, it would be forced to bear the resulting loss to the detriment of all participants and premium-payers in the insurance program. Especially given PBGC's tenuous financial position, with a deficit of over $23 billion, it can ill afford to bear such avoidable losses. The court of appeals' decision, which rejects USWA's interpretation in favor of a standard that balances the interests of participants, premium-payers, and PBGC, is best left undisturbed by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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